Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

INTERACTIVE AMERICA CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(a) Where a Federal Communications Commission ("FCC") auction of spectrum was tainted by fraud and numerous misrepresentations on the part of private promoters and FCC officials, which had the effect of seriously misleading bidders as to the value and usefulness of the spectrum being sold, should this Court's rulings in such cases as Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974) (severely limiting the scope of judicial review of agency actions) and Heckler v. Chaney, 470 U.S. 821 (1985) (holding that there is a presumption of non-reviewability of agency decisions which decline to take enforcement action) be modified or made the subject of an exception, so as to require the agency to provide relief from effects of the fraud and misrepresentations to which the agency (however unwittingly) became an accomplice?

(b) Where the FCC sold spectrum for use in the Interactive Video and Data Service ("IVDS"), and where IVDS was essentially the creation of only one company, i.e., EON Corporation, which falsely represented that it had working technology and equipment to implement an IVDS system, and where it turned out that the Chairman of the FCC had represented EON Corporation as a private attorney within the year preceding his appointment as Chairman, but the Chairman failed to disclose such prior representation of EON and actively participated in agency decisions which refused relief to spectrum purchasers who had been misled by EON's misrepresentations and false statements, should the standards of judicial review, set forth in such cases as Bowman and Heckler be modified or made the subject of an exception, so as to allow the appellate court to deal with and redress this obvious conflict of interest?

PARTIES TO THE PROCEEDING

The following persons or entities were parties to the Federal Communications Commission proceeding below and to the appeal before the U. S. Court of Appeals for the D. C. Circuit in Case No. 96-1271 and 96-1320:

Federal Communications Commission
The United States of America
Interactive America Corporation
Commercial Realty St. Pete, Inc.

Interactive America Corporation is a Delaware for profit corporation, incorporated on June 24, 1994. It has ten shareholders and its president is Christopher M. Pedersen of Memphis, Tennessee. The corporation is not publicly owned, nor is it affiliated with any other entity. No debt securities have been publicly issued. The sole activity of the corporation is to pursue licenses from the Federal Communications Commission for spectrum in the interactive video and data service (IVDS).

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OPINIONS BELOW

The Judgment and Order of the U.S. Court of Appeals for the D.C. Circuit, denying the relief requested by the Petitioner, which are unreported, are cited in the Table of Authorities and included in the Appendix.

JURISDICTION

The D.C. Circuit in a Judgment, Case No. 96-1271 and 96-1320, filed May 22, 1997, denied Interactive America Corporation's ("IAC") Petition for Review of the actions of the Federal Communications Commission ("FCC" or "Commission"), which denied Petitioner's request for relief in connection with an auction of Interactive Video and Data Service ("IVDS") spectrum (App. 46a-47a). In an Order filed August 6, 1997, the D.C. Circuit denied a petition for rehearing (App. 48a). The Court's jurisdiction is timely invoked under 28 U.S.C. 1254 (1). All required parties have been served.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved herein is the Fifth Amendment, which provides in pertinent part that no person shall be deprived of life, liberty or property without "due process" of law.

STATEMENT OF THE CASE

Under long-standing precedent, an administrative agency is required to consider fully the merits of appropriately articulated requests for waiver of its rules. At issue in this case is the FCC's failure to give the requisite full and fair consideration to a fully-supported waiver request filed by Interactive America Corporation ("IAC"), the high bidder for fifteen authorizations in the new Interactive Video and Data

Service ("IVDS") of the initial down payment deadline established pursuant to the Commission's Rules. See, 47 C.F.R. §95.816(c)(4) and §1.2107(b) (1995).

IAC first learned about the possibility of applying for and developing IVDS licenses from newspaper advertisements placed by the FCC during the first week of June 1994, which announced an auction of IVDS spectrum to be held less than two months later, on July 28 and 29, 1994. The auction was the first spectrum auction completed by the FCC, and was the only one ever to employ the "open oral outcry" methodology, in which the bidders gather at a hotel or other place and cry out their bids to an auctioneer. Unfortunately, the IVDS auction was also plagued by a series of problems so substantial that one FCC staffer in a published report has termed the IVDS auctions "the auctions from Hell." See Mike Mills, "Interactive TV: The Leap Looks A Long Way Off," Washington Post at H1 (July 2, 1995).

The FCC itself, whether intentionally or inadvertently, became an affirmative promoter of the promise of IVDS. Fact sheets prepared by the FCC and provided to IAC touted IVDS technology as providing an array of potential applications, combining "the functions of computers, TV sets and compact-disk players" and allowing users to enjoy such features as selecting camera angles during sporting events, paying bills, ordering food or merchandise (*e.g.*, pizza "with or without toppings"), playing video games, or choosing movies-on-demand. In a press release, the Commission also observed that "IVDS, with its expected relatively low capital entry requirements, is particularly well-suited for ownership by designated entities and other potential bidders that might otherwise lack the financial reserves to compete equitably in the auction process." These statements were made despite the fact that only a single equipment provided, EON Corporation ("EON"), formerly known as TV Answer, Inc., had received

Commission "type-acceptance" for IVDS equipment. In effect, the FCC had become a promoter of the nascent IVDS concept, not just an arbiter of the license assignment process.

Indeed, it is apparent from an internal FCC memorandum not intended for public distribution that the agency viewed itself as the "seller" of IVDS licenses — and was willing to bend its rules in the interest of securing larger bids for spectrum:

> Although you should not tell this to people, we intend to be liberal in granting waivers [regarding the substitution of bidding agents at auction under "unusual circumstances"] . . . The seller's (read FCC's) interests are furthered the more bidders we have in the room, as the more bidders we get, the higher the prices we will bring in. *Therefore, we will bend over backwards to bring them in.*

This unofficial policy differed markedly from the boldface statement in the FCC's IVDS Bidders Package that: **"Only the person or persons identified on FCC Form 175 as qualified to make a bid will be permitted to made a bid at the auction."**

The FCC's materials also informed interested parties that EON had developed the IVDS technology, and encouraged potential bidders to seek out such private sector suppliers for further information. Following this advice, IAC attempted to obtain information concerning EON, the new IVDS service and the technology available to implement it, and was provided by EON with impressive brochures depicting sleek set-top boxes and remote controls represented as ready for IVDS use. One such brochure provided the following glowing description of EON's "Personal TV Unit":

> The TV Answer Personal TV Unit is more than a collection of wires and circuit boards in a sleek case. It's the television viewer's portal to an existing new world of interactive games, shopping, education, banking, and much, much more . . . The Personal TV Unit, manufactured by Hewlett-Packard (HP), stores the logic and information that allow each user to access the TV Answer network. Using leading-edge systems integration technology and world-class manufacturing processes, HP builds each Personal TV Unit to live up to their reputation for exceptional quality, reliability and high performance." (Emphasis added.)

IAC has also been provided with a transcript of an EON videotape (prepared when it was still TV Answer) that was apparently circulated prior to the auction, in which it boasts that "what was once only a vision is today a reality so powerful it will transform your television into a two-way interactive window on the world." The same tape stated that EON had "developed, tested, and perfected [its] patented home unit and remote control" and that "service providers are signed up and will be ready from Day One." After the deadline for bidder applications passed on June 27, 1994, less than one month after the auction was first publicized, EON declined to provide additional information to IAC, including specifics concerning technical specifications, costs or equipment availability. EON stated that it was taking this position because it planned to participate in the IVDS auction itself, and feared that further discussions with other potential bidders would violate the FCC's rules. The FCC had placed no restrictions on the sole type-accepted equipment supplier's eligibility to itself become a bidder. IAC was therefore deprived of a critically important opportunity to perform its due diligence.

At the auction, IAC was the high bidder for fifteen licenses and paid upfront payments totaling $7500.00. Almost immediately after the auction, however, yet prior to the August 8, 1994 due date for the initial 10 percent down payment (totaling approximately $1.3 million in additional payment for IAC), troubling revelations concerning the status of EON's equipment first began to emerge, in confusing, piecemeal fashion, suggesting that its technology was not yet developed. Among other things, it was reported — accurately, as it turned out — that, contrary to EON's brochures, EON's reputed primary equipment supplier, Hewlett Packard, was in fact not doing business with EON, but had instead ceased its relationship with EON months before the announcement of the IVDS auction. In addition, it was learned that critical elements of EON's technology were subject to existing patent litigation with the original developer — litigation which EON represented to a Virginia court threatened the "technological foundation" of its business and compromised its future viability as a going concern. These stark revelations, particularly the prospect of lengthy litigation concerning the rights to EON's critical patents, created immediate doubt concerning the ability of the potential IVDS licensees to obtain the equipment necessary to meet the strict FCC system implementation deadlines which, *inter alia*, required each licensee to construct ten percent of its system within one year from the grant of its license, on pain of losing its license if the deadline was not met.

In light of this significant new information, IAC did not believe it or anyone else could reasonably be expected to meet the FCC's strict one-year construction deadline, which the Commission had already made clear it would not extend based on delays in equipment availability. IAC thus found itself in the difficult and unforeseen situation of being required to make a substantial down payment in excess of $1,300,000 for the right to construct IVDS facilities within a time-frame that no longer appeared feasible due to unavailability of equipment. In these

highly unusual circumstances, IAC believed that it was necessary for the Commission to provide the winning IVDS bidders, prior to the submission of funds, with some assurance that they would not lose their initial investments, and their licenses as well, if they were later unable to meet the one-year construction deadline.

Unfortunately, instead of assisting the putative IVDS licenses in grappling with the problems that were, in part, of the FCC's own making, the FCC took a hard line stance against a postponement of the down payment deadline. Just prior to that deadline, the FCC released a Public Notice under the heading "IVDS Bidder Alert" which evidenced its intention not to consider any change in the down payment deadline. The Public Notice flatly stated that "[t]he Commission has not and does not intend to change its deadline," and went on to describe penalties for default and to threaten additional legal action against those that did not pay on August 8, 1994.

The FCC's Public Notice notwithstanding, IAC reasonably believed it was appropriate for it to seek a waiver under the FCC guidelines providing for exceptions to the FCC's rules under special circumstances for "good cause shown". IAC firmly believed that the substantial inaccuracies in the information available concerning IVDS prior to the auction, which were only beginning to come to light in the post-auction period, fully justified a brief extension of the payment deadline to permit the Commission to address the legitimate concerns of IAC and other winning bidders. Accordingly, after assuring itself that "good cause" existed to support a waiver, IAC timely filed on August 8, 1994, a good faith request for a 30-day postponement of the initial payment obligation, and some assurance from the Commission that it would extend the one-year build out term and/or approve at least one more competitive equipment supplier. In its request, IAC specifically cited the equipment unavailability problem and the now clearly

unreasonable one-year build-out milestone as justification for this brief extension, stating that EON's newly disclosed problems created tremendous difficulties for the winning IVDS bidders due to "a real likelihood as to forfeiture of the two 10% [down payments] due to winners not being able to meet the build out requirement [in] years one (1) through three (3)." IAC also pledged its willingness to pay interest on the amount due at a mutually agreed rate.

IAC was joined by many others in requesting relief from the down payment deadline. Indeed, fully 15 separate winning bidders, representing at least 68 of the 297 MSA's included in the auction (23 percent of the MSA's) sought waivers/extensions of the deadline.

On October 7, 1994, the Common Carrier Bureau summarily rejected IAC's waiver request, and others, in a brief Order (App. 1a) that did not give the appropriate and necessary consideration to the significant arguments raised by IAC in support of a postponement.

IAC filed a timely Petition for Reconsideration of the Common Carrier Burear Order, which was denied by a Memorandum Opinion and Order of the full Commission, released September 1, 1995 (App. 12a). IAC then timely petitioned the full Commission for reconsideration, but that request was denied by another Memorandum Opinion and Order, released July 11, 1996 (App. 24a). IAC then filed a timely Petition for Review in the U.S. Court of Appeals for the D.C. Circuit, which was denied by a Judgment, released May 22, 1997 (App. 46A). IAC petitioned for rehearing, showing the Court on the basis of newly discovered information that FCC Chairman Hundt, who had participated in the Commission's decisions, was deeply conflicted because, prior to becoming Chairman, he had served as counsel to EON Corporation. Nevertheless, the petition was denied by Order,

released August 6, 1997 (App. 48a).

REASONS FOR GRANTING THE PETITION

(a) The petition for writ of *certiorari* raises an important question of Federal law as to whether, in light of the recent actions of the Congress, mandating the use of government auctions to award radio and television spectrum, and in light of the widespread fraud and misrepresentation which tainted the auction which is the subject of this Petition, is there an urgent need for this Court to intervene and clarify the role to be played by the court system to insure the integrity and fairness of future auctions?

Through the Balanced Budget Act of 1997, the Congress has amended Section 309(l) of the Communications Act (47 U.S.C. §309) to provide for competitive bidding to be utilized in virtually all cases involving an award of a construction permit or license for the use of radio and/or television spectrum. In this case, although the IVDS auction was tainted by serious misrepresentations and, as will be shown later, by a conflict of interest on the part of the FCC Chairman, the Court of Appeals declined to intervene and exercise its oversight authority. It should, however, have done so.

In this case, the Commission failed to give due consideration to IAC's request for extension of the IVDS down payment deadline in light of the confusion and concern that had resulted from post-auction disclosures concerning the IVDS equipment market. IAC sought only a brief 30-day period of time during which it expected that the Commission would provide licensees with reasonable assurances that they would not be held to strict build-out timetables that it was then evident that IVDS licensees would be unable to meet — in light of

newly discovered problems with EON, the sole type-accepted equipment supplier. There was no reason for the Commission to decline to address this issue — and indeed it ultimately repealed the one-year build-out deadline that was the object of IAC's concern, in effect validating IAC's argument that the deadline was unreasonable given both the changed circumstances created by the decision to auction (rather than award by lottery) the IVDS spectrum and the state of the IVDS equipment market, including EON's significant legal and technical problems. The Commission's failure to give meaningful consideration to the emerging facts presented to it was arbitrary and capricious and an abuse of its discretion, necessitating correction. See, 5 U.S.C. §706(2)(A)(1996).

Fundamentally, all waiver requests are entitled to consideration. Thus, basic principles of administrative law and long-standing judicial precedent dictate that the FCC give all requests for waiver of its rules a "hard look." See, WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969) cert. denied, 409 U.S. 1027 (1972); see also, U.S. v. Storer Broadcasting Company, 351 U.S. 192 (1956). "The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances." WAIT Radio, 418 F.2d at 1157. WAIT Radio and its progeny clearly require more than a summary dismissal of the waiver applicant's arguments. Indeed, what is required is "the indicia of reasoned analysis based on carefully weighed facts." Springfield Television Corp. v. FCC, 609 F.2d 1014, 1020 (1st Cir. 1979) (quoting State of Maine v. C.A.B., 520 F.2d 1240, 1245 (1st Cir. 1975)). Despite this obligation to give all waiver requests "meaningful consideration," the Commission's summary dismissal of IAC's reasonable request for a 30-day postponement of the down payment deadline until the uncertainties regarding IVDS equipment availability were clarified, when coupled with the threats of punishment for

nonpayment made by the FCC even before the request was filed, is evidence that the Commission took a reflexive "hard line" rather than the requisite "hard look". See, WAIT Radio, 418 F.2d at 1159; San Diego Gas & Elec. Co. v. FERC, 904 F.2d 727, 731 (D.C. Cir. 1990).

In finding that no special circumstances existed to justify a waiver of the down payment deadline, the Commission failed to give any real consideration to the post-auction revelations concerning the availability of IVDS equipment that gave rise to legitimate and substantial concerns among auction winners about their ability to acquire in a timely manner the IVDS equipment necessary to comply with the Commission's strict one year construction milestone. Instead, the Commission admonished IAC and others similarly situated that "[a]pplicants should factor this unique mix of obligation and uncertainty into their bidding choices." Requests for Waivers in the First Auction of Interactive Video and Data Service (IVDS) Licenses, 11 FCC Rcd at 8213 (¶5).

This assertion ignores entirely the fact that the inaccuracies and misrepresentations that were set forth in EON's press releases and promotional materials came to light only after the submission of bids and the conclusion of the auction. The unfortunate timing of these disclosures was itself largely the result of the Commission's ordering an auction for a brand new service in a compressed time frame, having identified only a single type-accepted equipment supplier who, because it was free to bid for the licenses itself, refused at a critical juncture to provide information to those performing their due diligence. Had IAC been aware before the submission of its IVDS bid that: (1) Hewlett Packard had withdrawn its commitment to manufacture the IVDS equipment, (2) EON was engaged in ongoing patent litigation over substantial elements of its touted technology, which EON believed was a threat to its ability to remain a viable company, and (3) EON had no

equipment ready to supply IVDS licensees, this information could have and surely would have been reflected in IAC's auction bid. IAC was unable to consider these factors because EON failed to disclose them. These material facts were concealed from IAC and every other bidder (except EON itself) during the brief period before the auction, and therefore, their disclosure toppled critical underpinnings upon which IAC's bids were based — even EON, the promoter of the IVDS concept, did not have a definite plan to make the service viable.

The Court of Appeals denied IAC's appeal (and another appeal filed by Commercial Realty St. Pete, Inc.), in part because the Court found that the "FCC provided notice prior to the auction of the availability of IVDS technology." That was true, but it overlooked the fact that almost all of the information supplied by the FCC prior to the auction was false and misleading. In petitions filed with the FCC and later with the Court of Appeals, both IAC and Commercial Realty St. Pete, Inc., called the Court's attention to the false information put out by the Commission and by EON Corporation.

EON and its predecessor TV Answer, Inc., had distributed brochures, containing many representations concerning the availability of technology and equipment, which later turned out to be false. One brochure actually shows a photograph of a "simple set-top box and remote control [which] are all viewers need to talk back to their televisions". The brochure goes on to say that, "The Personal TV Unit, manufactured by Hewlett-Packard (HP), stores the logic and information that allow each user to access the TV Answer network. Using leading-edge systems integration technology and world-class manufacturing processes, HP builds each Personal TV Unit to live up to their reputation for exceptional quality, reliability and high performance." This, of course, later turned out to be false. There was no "Personal TV Unit", whether manufactured by HP or anybody else.

These misrepresentations were repeated by TV Answer in a slick television "infomercial", a transcript of which was submitted to the FCC in a September 22, 1995, Petition for Reconsideration, filed by Commercial Realty St. Pete, Inc. In the infomercial, famed TV personality Paul Anthony declares that, "You know, for the past six (6) years, TV Answer has invested more than Seventy Million Dollars building and perfecting this exciting two-way interactive technology". He goes on to say that, "We continue to forge strategic alliances with industry leaders like Hewlett Packard and Hughes Network Systems and we continue to add to our growing list of revenue-generating national service providers, which include Domino's Pizza, J.C. Penney, M.T.M's QB1, Meridian Bank, and many more . . . Hewlett Packard is preparing the home unit for distribution to consumers. The cell site deployment plans are being developed. TV Answer's satellite network and control centers are preparing to receive and process your transactions. And the service providers are signed up and will be ready Day One." None of the foregoing was true.

Unfortunately, the FCC was "taken in" by EON's false statements. In a "Fact Sheet" released in October, 1993, and filed as an Appendix to IAC's Brief in the Court of Appeals, the FCC said as follows:

> "IVDS systems are designed to operate with a hand-held remote control device that controls an interactive television box similar to a VCR - on the subscriber's television set on which menu data can be displayed. A viewer would interact with the TV station through a radio signal, using an IVDS frequency. The signal, such as a product order or information request, would be received and processed by regional receiving centers, along the lines of a cellular telephone system. . .

> Depending on what the licensee chooses to offer, IVDS could combine the functions of computers, TV sets and compact-disk players. Subscribers will be able to choose the camera angle during a sporting event, pay bills, shop-until-they drop at malls, choose endings to TV shows, check college catalogues, play video games, choose movies on demand, or order a pizza with or without toppings."

None of the foregoing was true. Nobody had developed any IVDS system which would enable viewers to control camera angles during sporting events, or shop at malls, or choose endings to TV shows, or check college catalogs, or play video games, or choose movies on demand, or even order a pizza. No such IVDS system existed then and none exists today.

In a speech to prospective IVDS bidders, given on June 3, 1994, prior to the auction, FCC official Joy Alford declared that "All of you . . . are here to obtain more information about what has been described by many as one of the most exciting new radio services and resultant business opportunities to evolve in the telecommunications arena. This [technology] has the potential to change the way we shop, the way we learn, the way we bank, the way we receive health-care, ultimately, the way we live. The radio service of which I speak is Interactive Video and Data Service".

Ms. Alford explained that, "A grand total of one company, EON, has received type- acceptance for equipment to operate in this service. So as you can see, IVDS is truly, in an 'embryonic' stage". That was certainly true! But, Ms. Alford went on to say the following:

> "As I indicated during my opening remarks, the potential opportunities in IVDS are numerous.

> We expect service offerings to include, for instance, home shopping. The service may also be used for polling. There are also commercial applications such as home banking and the downloading of data. Service offerings are expected to include opportunities for television-viewer interaction, in real time, to pay-per-view and educational programming. This service is excellent for in-classroom training for homebound students. Imagine teachers instructing 20 classrooms simultaneously, at an equal number of learning institutions. In the area of medicine, for example, a physician may engage in a 'dialogue of sorts' while demonstrating a new medical procedure to fellow physicians or medical students located across the country. Keep in mind that an IVDS system may incorporate numerous electronic media to provide the desired service to its subscribers. IVDS systems can be coordinated with television broadcast stations, cable television stations and wireless cable as well as direct broadcast satellite (DBS)."

Now, in fact, there was no way that IVDS could ever be used to assist a physician in demonstrating a new medical procedure to students or anybody else, because the bandwidth allocated to the system (500 kHz) was inadequate to transmit a quality video signal, and the IVDS rules (47 C.F.R. Sections 95.803, et seq) do not provide for the transmission of any pictures or, for that matter, any audio. Only data is to be transmitted, and short bursts of data at that, intended, perhaps, to order a pizza. Likewise, because IVDS could not be used to transmit sound or pictures, it could not be used for classroom training. Ms. Alford's statements to the contrary, while sincere and well intentioned, were simply wrong.

Furthermore, and wholly aside from the foregoing, IVDS could not have been used for home shopping, polling or banking because nobody had developed a working IVDS system at the time of the auction. Indeed, to this very day, a working IVDS system has yet to be developed. No technology has been developed and, accordingly, no equipment has been developed or manufactured. Therefore, while the Court of Appeals was correct in finding, as it did, that the FCC had given notice of the availability of IVDS technology prior to the auction that Court overlooked the inaccuracy of the "notice" which the FCC gave.

> (b) This petition for writ of *certiorari* raises an important question of Federal law as to whether the actions of the were tainted by the failure of FCC Chairman Hundt, who had served in the past as private counsel to EON Corporation, to recuse himself from important FCC decisions directly affecting EON Corporation?

As we have shown, IVDS was essentially the creation of a single company, EON Corporation (successor to TV Answer, Inc.), which promoted the system and obtained FCC rules providing for spectrum to be allocated to the service. On February 17, 1997, an article appeared in the Washington Post, written by Mike Mills, and entitled "Interactive TV Dream Fades for Licensees: Some Say FCC Hyped Unproven Technology." There, Mr. Mills reported on an interview with Chairman Hundt in which the Chairman made a startling disclosure, i.e., that he had been employed by EON Corporation as an attorney in private practice prior to coming to the FCC. Furthermore, it appears that the Chairman had been so employed within the year before he came to the FCC.

Although the newspaper article disclosing Chairman Hundt's prior representation of EON includes the Chairman's statement "that no issues directly involving TV Answer have

arisen" in connection with the controversies surrounding IVDS, the record below contradicts this assertion. EON, Chairman Hundt's former client, opposed Commercial Realty St. Pete, Inc.'s request for relief, disputing [CRSPI's] allegations of equipment unavailability. Because disclosures concerning the problems with EON's representations regarding its equipment lay at the heart of IAC's request for relief as well, there is no question that EON had staked out a position that conflicted directly with the arguments made by IAC in its waiver request. Indeed, the FCC General Counsel's Office took such a position when IAC sought to meet with FCC staff to discuss its waiver request, which itself was not formally opposed. The General Counsel determined that IAC's petition was nonetheless restricted because EON had opposed Commercial Realty's similar request for relief. Thus, the General Counsel treated EON (correctly) as a party to the proceedings.

There is no question that a government agency decisionmaker is expected to recuse himself where a conflict arises concerning a party that he has previously advised as an attorney in private practice within the year preceding his government service. 5 C.F.R. §§2635.502(a) and (b)(1)(v). Moreover, where such a prior relationship outside this time period might give rise to even the appearance of a conflict of interest, it is expected that the affected decisionmaker will not participate in the matter at issue unless he has received an opinion from appropriate agency personnel that his participation would be consistent with "the integrity of the agency's programs and operations." 5 C.F.R. §2635.502(d). There is no evidence on the record of this proceeding that Mr. Hundt took such a necessary step with respect to his prior relationship with EON. Indeed, based on the published report, Mr. Hundt simply denied that "issues directly involving TV Answer have arisen." As demonstrated above, however, EON/TV Answer took it upon itself to become directly involved in the matter of the IVDS waiver requests and opposed a grant of the relief that was denied

by the Commission. Under these circumstances, Chairman Hundt's unexplained participation in the proceedings concerning the IVDS waiver requests raised a significant issue of agency bias that was not addressed by the Court of Appeals. When the conflict was called to the Court's attention in IAC's petition for rehearing, it should have been addressed.

Perhaps the Court of Appeals felt constrained not to review the information developed after the closing of the FCC record (and, indeed, after the case had been briefed in the Court of Appeals), because of the narrow standards of judicial review imposed by this Court in such cases as Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974), and Heckler v. Chaney, 470 U.S. 821 (1985). If so, justice requires that the holdings of this Court be either modified or excepted, so that the appearance of bias which arises from the Chairman's prior employment by a party to the proceeding in which he played a decision-making role may be rectified.

CONCLUSIONS

WHEREFORE, in view of the foregoing, the Court is urged to grant IAC's petition for writ of *certiorari*, because the actions of the FCC are in conflict with the "due process" clause of the Fifth Amendment, and in conflict with established precedent of this Court. Moreover, this petition raises an important issue as to whether certain precedent of the Court should be limited in scope.

Respectfully submitted,

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APPENDIX A, ORDER, (FCC), DA-94-1126, WAIVERS IN THE FIRST AUCTION OF 594 INTERACTIVE VIDEO AND DATA SERVICE LICENSES, rel. October 7, 1994.

1. Before the Bureau are a number of variously styled requests filed by high bidders [FN1] for certain licenses in the Interactive Video and Data Service (IVDS). One group of requests essentially seeks a waiver from the Commission that would permit them to delay the payment of their initial down payments on these licenses that were due on August 8, 1994 until a future date. These requests were filed by American Classic Financial Company, Ball Park Souvenirs, Inc., [FN2] the Broward Times, Inc., Tarik Choudhury, Commercial Realty St. Pete, Inc., [FN3] Manoranjan Das, Ruth Das, Graceba Total Communications, Inc., Interactive America Corporation, Louisiana Interactive Broadcasting System, Inc., Henry Mayfield, Phoenix Data Communications, Inc., Rasputin International, Inc., James Speights, and Vision TV, Inc. Some of these requests were filed prior to the August 8 down payment deadline while others were filed after that deadline. Some filed multiple requests. EON Corporation and Radio Telecom and Technology, Inc. (RTT) opposed the Petition for Extraordinary Relief filed by Commercial Realty St. Pete, Inc.

2. A second group of high bidders made their initial down payment but requests relief from the requirement of further payments (see joint Petition for Extraordinary Relief of AG Partners, Friends of IVDS, IVDCO LLC, IVDS/RLV Partnership, Infopower International, Nanowave Technologies, New England Mobile Communication, Tele-Link Communications, WCTV Partners, Washington Communications, Wayne Partners, and Zarg Corporation, hereafter "Joint Petitioners"). This group of petitioners also requests that the Commission reduce the amount of interest payments for those high bidders entitled to installment financing, and to either freeze the grant of all IVDS licenses or extend the time for construction of the facilities covered by the

license. Graceba Total Communications, Inc. (Graceba), which also made its initial down payment, filed a similar request. We do not address here the petition filed by the Joint Petitioners or by Graceba, but we do address the first group of requests, as well as certain other miscellaneous requests, below.

3. Many in the first group of petitioners argue that their respective financial backers unexpectedly withdrew financial support shortly after the auction, leaving them unable to pay the 10 percent initial down payment by the August 8, 1994 deadline (see, e.g., American Classic, the Broward Times, Louisiana Interactive). Others argue that assertedly late or erroneous winning bidder schedules sent by the FCC's auction contractor prevented them from making their deposit in a timely manner (see, e.g., Tarik Choudhury and Ruth Das).

4. Some in this first group argue that the purported lack of readily available equipment to provide IVDS service justified a delay in the payment deadline (see, e.g., Commercial Realty St. Pete, Inc., Manoranjan Das, Phoenix Data). These petitioners state that there is only one supplier of IVDS equipment, EON Corporation, whose equipment is type accepted [FN4] by the FCC. [FN5] They argue, for example, that the public interest would not be served by requiring high bidders to make their down payments until there is some assurance that working technology for IVDS systems exist, until there are at least two type accepted IVDS equipment vendors, and until equipment can be shipped on a timely basis so that the licensee does not forfeit its license for failure to meet the construction requirements in the FCC's Rules. [FN6]

5. We address first the group of petitions requesting waiver of the requirement for submission of a 10 percent initial down payment. This requirement derives from the Second and Fourth Reports and Orders in PP Docket No. 93-253, 9 FCCRcd 2348 (1994) and 9 FCCRcd 2330 (1994). There, the Commission noted that high bidders would be required to make a down payment in order to provide assurance that they would be able to attract capital, to discourage default, to assure that

such bidders would be able to pay the full amount of their bids, and to ensure payment of the default penalty if default subsequently occured. See, e.g., Fourth Report and Order at para. 25, Second Report and Order at para. 190. The Commission required payment by auction winners of a down payment equal to 20 percent of their winning bids within five business days after the close of the auction. [FN7] Small businesses, as defined by the Commission, were permitted to split their down payments into two parts, each equal to 10 percent of their winning bid. Id. at n. 145. In any case, however, a minimum of 10 percent of a bidder's winning bid is due within five business days following the close of bidding. [FN8]

6. The requests for waiver of the requirement for timely initial down payments by the first group of petitioners are denied. WAIT Radio v. FCC, 418 F.2d 1153 (D.C.Cir.1969). One of the most common reasons offered in support of a waiver was the purported lack of equipment availability. In several instances, the petitioners state that a facsimile letter sent from one high bidder to other high bidders discussing the purported lack of IVDS equipment was responsible for withdrawal of financial backing needed to make their down payments. See, e.g., August 15, 1994 letter from Marilyn Moore, President, Louisiana Interactive Broadcasting System, Inc. to General Counsel; August 18, 1994 letter from Keith Clayborne, President, the Broward Times, Inc. to Secretary, FCC. This facsimile letter was submitted as an attachment to Ms. Moore's letter. The facsimile letter appears to have been authored by Commercial Realty St. Pete, Inc., another winning bidder which did not submit its initial deposit. It states that because IVDS system equipment was purportedly unavailable, winning bidders should jointly petition the FCC to defer the August 8 deadline for initial down payments. See also August 15, 1994 letter from Henry Mayfield to Chief, Special Services Division. [FN9]

7. The status of IVDS equipment availability, however,

is a matter which we believe prudent businesspersons would investigate prior to committing thousands or millions of dollars for an IVDS license. The availability of equipment, its cost, and its capabilities are matters which have an important bearing on whether and how much to bid for an IVDS license. Bidders who won IVDS licenses without fully understanding these matters should not be able to shift responsibility for their actions onto the government. Grant of a waiver would do so by allowing them to avoid the financial obligations they willingly undertook when they applied to participate in the auction. The exercise of due diligence prior to participating in an auction is very much in the public interest and we wish to do nothing that would discourage such conduct.

8. Moreover, both RTT and EON Corporation have vigorously disputed allegations of equipment unavailability. RTT, for example, states that it intends to have equipment available for delivery in 1995 and has a strategic alliance with Oki Electric Co. to bring equipment to the market. See Comments of RTT on Petition for Extraordinary Relief at 2. EON also states that one winning bidder has been quoted as saying that it has been talking with large equipment manufacturers and that the bidder expects to contract with one of those firms to develop the hardware technology for it. See EON Opposition to Petition for Emergency Relief at 8-9.

9. Grant of a waiver would also be grossly unfair to those applicants who, notwithstanding the nascent state of IVDS, nonetheless made their initial down payments, for they would be worse off after having complied with the rules. For example, EON Corporation, which was, through affiliates, a successful high bidder on several IVDS licenses and which made substantial initial down payments for those licenses, opposes Commercial Realty St. Pete's emergency motion to stay IVDS payment deadlines. EON states that its substantial financial commitment to IVDS would be at risk if licensing were to be delayed. See EON Opposition to Emergency Motion for Stay at 2.

10. Moreover, contrary to the petitioners' apparent expectations, the purpose of type acceptance is limited: it is intended to minimize the potential for harmful interference [FN10] and is not intended as a governmental warranty that a particular manufacturer's equipment is commercially acceptable and available in commercial quantities. The fact that only one manufacturer's IVDS equipment was type accepted was a matter of public record before the IVDS auction took place. A prudent bidder would be aware of this and would adjust its bids accordingly. Grant of the requested waiver would shift responsibility for imprudent business practices onto the government rather than on the bidder, where it belongs. [FN11]

11. The Commission also cannot be responsible for the private business arrangements that an applicant has made to finance its successful bid. If an applicant is unsure of its financing, it seems that the more appropriate course would be to not bid or to not bid in excess of the commitments of which it was reasonably certain. If a single letter sent after the auction has occurred can derail financial commitments amounting to many thousands or even millions of dollars, we are concerned whether the bidder was ever a serious, qualified bidder.

12. Grant of the requested waiver is likely to undermine the important public interest goal that only serious, qualified bidders participate in spectrum auctions. As the Commission made clear in para. 192 of the Second Report and Order, a substantial delay between auction and down payment would "subvert our objective of reducing speculative bidding because it would provide financially unqualified bidders with an opportunity to 'shop' a winning bid in an effort to obtain financing for a down payment. This would undermine the integrity of the auction itself." Such "bid shopping" is exactly what several of the petitioners have stated they intend to do if a waiver is granted. Grant of the requested waivers will further encourage such undesirable conduct and lessen the likelihood that in the future, only serious, qualified bidders will participate in Commission-sponsored auctions. [FN12]

See also In re Rule Interpretation and Waiver Requests for the Auction of Ten Nationwide Narrowband Personal Communication Service Licenses, DA 94-768, released July 11, 1994, and Public Notice, IVDS Bidder Alert, released August 5, 1994. [FN13]

13. The Commission also observed that there was a greater risk of default during the period between the close of the auction and licensing than immediately after the auction because there is a greater risk of a drop in license values. Second Report and Order at para. 190. Grant of a waiver would increase the likelihood that any drop in license values would be borne by the government rather than by bidders. No bidder was forced to bid at the auction, and the government cannot guarantee the financial success of widely differing business plans or prospects. The waiver requests are denied for this reason as well. [FN14]

14. Also before the Bureau are requests by Emerging Technologies Partners, Georgia Felger, Henry Mayfield and Pueblo Communications to allow them to elect small business status even though the time for amending FCC Form 175 has passed. [FN15] Section 1.2105 of the Commission's Rules provides that bidders will have a limited opportunity to cure defects in their Form 175 except that failure to sign an application or to make the required certifications may not be corrected. As announced by Public Notice issued July 7, 1994 such corrections were due no later than July 14, 1994. Thus, requests to correct applications in order to elect small business status should have been filed no later than that date.

15. However, it appears that the public interest would be served by waiving the July 14 deadline in this instance and allowing the aforementioned four bidders to elect small business status at this time. The initial Form 175 which was distributed by the Commission to potential bidders contained a misprint that may have misled applicants into believing that there was no need to elect small business status separate from status as a minority or woman owned business. Although the

Commission moved to correct this situation both through the issuance of a Public Notice on June 17, 1994 [FN16] and through overnight letters to each applicant who appeared to have been misled, it is not clear that the Commission was able to reach every applicant in sufficient time to allow it to correct possible misimpressions.

16. The benefits of small business status should not be denied due to confusion or misunderstandings which may have been caused by misprints for which the Commission is responsible. Congress made clear its desire to ensure opportunity for these entities in new Section 309(j) of the Communications Act, and no other bidder would be prejudiced by allowing these four winning bidders to elect small business status at this time. Moreover, the misprint has been corrected in subsequent versions of Form 175; therefore this particular problem should not occur again. Accordingly, the request by these four petitioners to elect small business status out of time are granted. The licenses issued to these petitioners, however, will be conditioned upon submission within 30 days after issuance, of a certification by the applicant under penalty of perjury that it qualifies for small business status under the Commission's Rules.

17. Also before the Bureau is a request from Ball Park Souvenirs, Inc. to delay for seven to ten days the submission of certain engineering information which would normallly be filed with its Form 574. This request is based upon asserted difficulties in retaining engineering consultants to perform this work on a timely basis. We note that all high bidders at the July 28-29, 1994 auction for IVDS licenses were required to submit Form 574 no later than August 15, 1994. See Public Notice No. 44160 released August 2, 1994. We recognize that there are a limited number of consulting engineers capable of performing such work on short notice. We previously granted, and here confirm, Ball Park's request.

18. Accordingly, IT IS ORDERED, that the requests for waiver of the filing date requirement for the initial down

payment filed by American Classic Financial Company, the Broward Times, Inc., Tarik Choudhury, Commercial Realty St. Pete, Inc., Manoranjan Das, Ruth Das, Interactive America Corporation, Louisiana Interactive Broadcasting System, Inc., Henry Mayfield, Phoenix Data Communications, Inc., Rasputin International, Inc., James Speights, and Vision TV, Inc. ARE DENIED.

19. IT IS FURTHER ORDERED, that the requests by Emerging Technologies Partners, Georgia Felger, Henry Mayfield and Pueblo Communications to elect small business status out of time ARE GRANTED.

20. IT IS FURTHER ORDERED that, the request of Henry Mayfield to amend his FCC Form 175 from individual applicant to partnership status IS DENIED.

Gerald P. Vaughan
Deputy Chief

FN1. The first IVDS auction was held in Washington, D.C. on July 28-29, 1994.

FN2. This request will be dismissed as moot. This applicant ultimately made its initial down payment in a timely manner.

FN3. Commercial Realty St. Pete, Inc. filed two pleadings: a "Petition for Extraodrinary Relief" and an "Emergency Motion for Stay, Lite Pendente." Both seek essentially the same relief, which is to stay all payment deadlines applicable to the IVDS auction until a later date. The Motion for Stay will be addressed separately.

FN4. Type acceptance is a process by which equipment manufacturers demonstrate to the Commission that equipment which is to be used in connection with an FCC issued station license meets certain technical standards designed to promote efficient use of the radio spectrum. See Subpart J of Part 2 of the Commission's Rules. Only type accepted equipment may be used to operate an IVDS system. See 47 C.F.R. Sec. 95.851. To date, the Commission has type accepted IVDS equipment

from one manufacturer, EON Corporation.

FN5. We note, however, that RTT on September 28, 1994 filed a request for assignment of a grantee identifier to be used in future applications for equipment authorizations. See letter of Peter Tannenwald, counsel to RTT, to Acting Secretary, FCC.

FN6. See Petition for Extraordinary Relief of Commercial Realty St. Pete, Inc. at 7-8. Section 95.833 of the Commission's Rules requires IVDS licensees to make their service available to increasing amounts of the population or geographic area in their license area over time. Failure to attain such coverage causes the IVDS license to cancel automatically.

FN7. Due to computer difficulties, the Commission afforded winning bidders an extra day to submit their initial down payments.

FN8. The initial assertion by Ruth Das and others similarly situated that the FCC's contractor sent him an incorrect winning bidder schedule, thereby justifying a waiver of the requirement to submit an initial deposit, is specious. It is correct that certain schedules, including that sent to Ruth Das, listed an erroneously large figure for the required initial down payment. Nonetheless, the contractor orally notified some of these bidders of the correct figures in sufficient time to enable them to wire funds to the Commission's lockbox bank. Second, even if the initial winning bidder schedule contained an erroneously large figure for the required payment, in no case would this justify making no down payment at all. The winning bidder schedule is provided purely for the convenience of the bidders. All winning bidders are required under the terms of the rules to make an initial down payment of at least ten percent of their winning bid within five business days after the auction. There are no exceptions. See Section 1.2107 of the Commission's Rules.

FN9. Mr. Mayfield's other request, which is to amend his application from individual applicant to partnership status, is denied. Such a change would be a major amendment and is not permitted under Section 1.2105 of the Rules.

FN10. See Amendment of Part 2 of the Commission's Rules, 23 FCC2d 79 (1970).

FN11. Commercial Realty St. Pete also argues in its Petition for Extraordinary Relief, that a "giant bottleneck" will develop due to the demands for IVDS equipment placed upon EON Corporation. This, assertedly, will prevent IVDS licensees from meeting the construction deadlines of Section 95.833 of the Commission's Rules, and cause them to lose their licenses. This outcome, rather than being virtually guaranteed as the petitioner asserts, is highly speculative and vigorously disputed. See Comments of RTT on Petition for Extraordinary Relief. Even if it were true, the appropriate course is not to delay payment of the initial down payment but to request a waiver of the construction deadline. Id.

FN12. This reason for not granting the waiver requests is therefore particularly germane to the waiver requests filed by petitioners such as Manoranjan Das, Ruth Das, and Rasputin International, Inc. It is irrelevant that these petitioners are now assertedly willing and able to make their initial deposits if only the FCC will absolve them from any possible penalties for late payment.

FN13. The pendency of a Section 403 investigation into certain IVDS high bidders does not justify a waiver of the down payment requirement. Interactive America, which made this request, offers no reason why this investigation should affect the monetary obligations of high bidders.

FN14. See also n. 12, supra.

FN15. Status as a small business permits an IVDS applicant to make its down payment in two stages and provides access to government-sponsored installment financing. See Fourth Report and Order at n. 44 and paras. 53-54. A few applicants were previously permitted to elect small business status after the time for such amendments had passed because the Commission's contractor was unable to successfully communicate to these applicants the need to revise their applications to correct a misprint in FCC Form 175.

FN16. "First Amendment to Bidder's Information Package and the May 23, 1994 Public Notice Announcing the Auction of Approximately 600 Interactive Video and Data Service Licenses to be held July 28-29, 1994 at the Omni Shoreham Hotel, Washington, D.C.", released June 17, 1994.
9 F.C.C.R. 6384, 9 FCC Rcd. 6384, 1994 WL 554221 (F.C.C.)

APPENDIX B, MEMORANDUM OPINION AND ORDER, FCC 95-367, WAIVERS IN THE FIRST AUCTION OF INTERACTIVE VIDEO AND DATA SERVICE (IVDS) LICENSES, rel. September 1, 1995

I. INTRODUCTION AND BACKGROUND

1. On July 28 and 29, 1994, the Commission held an auction to award licenses in the Interactive Video and Data Service (IVDS). Pursuant to the auction rules, [FN1] on August 8, 1994, winning bidders were required either to submit their total "down payment" amount or, if they claimed "small business" status, to pay an initial down payment equal to one-half of the total down payment amount. Some winning bidders failed to make their down payment(s) by the August 8, 1994, deadline, and filed waiver requests seeking extensions of that payment deadline. By Order adopted October 7, 1994, [FN2] these waiver requests were denied pursuant to delegated authority. By this Memorandum Opinion and Order, we deny the Application for Review of that Order filed by Commercial Realty St. Pete, Inc. (Commercial Realty), [FN3] and four Petitions for Reconsideration filed by Interactive America Corporation (Interactive), Louisiana Interactive Broadcasting System, Inc. (Louisiana), Henry L. Mayfield (Mayfield), and Vision TV, Inc. (Vision). [FN4]

2. Pursuant to our auction rules, all license grants are conditioned on full and timely payment of the license price. Small businesses are eligible under our rules to pay for their licenses in installments over the term of the license. All winning bidders, however, are required to make a down payment on their licenses within five business days after being notified that they are the winning bidder on a license. [FN5] The requirement of a full and timely down payment is intended to ensure that winning bidders "have the financial capability to attract capital to rapidly deploy their systems and operate them in an efficient manner." [FN6] The down payment requirement,

in other words, ultimately helps deter defaults by discouraging "insincere" bidders from winning licenses solely with the expectation that, post-auction, they can "shop" their winning bid in a late effort to obtain financing. [FN7] Permitting such actions, we have stated, "would undermine the integrity of the auction itself." [FN8]

II. DISCUSSION

Availability of Equipment

3. A primary argument of those requesting a waiver of the IVDS down payment deadline has been that the "build-out" requirement for IVDS, [FN9] coupled with an alleged lack of multiple providers of IVDS equipment, seriously compromised the winning bidders' ability to retain financing immediately following the auction. Specifically, Commercial Realty and Interactive state that, despite their best efforts to evaluate the IVDS equipment market prior to the auction, they could not determine whether sufficient equipment would later be available with which to meet the build-out deadlines. [FN10] They state that they were faced with the choice of either not participating in the auction, or participating with incomplete information. They argue that it was reasonable, under these circumstances, to participate in the auction. Finally, they state that they were misled on this issue prior to the auction by both the Commission and EON Corporation, an IVDS equipment manufacturer.

4. The October 7, 1994, Order stated, in response, that the availability of equipment, its cost, and its capabilities were matters having an important bearing on whether and how much to bid for an IVDS license. In addition, the Order stated that "[b]idders who won IVDS licenses without fully understanding these matters should not be able to shift responsibility for their actions onto the government." [FN11] Finally, it was noted that claims of equipment unavailability were speculative and disputed, and that granting down payment waivers would be

unfair to winning bidders that paid on time. [FN12]

5. We find the petitioners' arguments unpersuasive. The Commission undertook substantial educational outreach efforts prior to the auction. For example, we released the Fourth Report and Order in the auctions proceeding, concerning IVDS, on May 10, 1994, [FN13] and released Public Notices giving additional procedural details and answering questions on May 23, June 17, and July 5, 1994. [FN14] We also provided potential applicants, on request, with a "Bidder's Information Package," and held an auction seminar on June 6, 1994, which was also carried on satellite feed. These efforts provided potential applicants adequate and timely information concerning the IVDS build-out requirements and the equipment market at that time. In particular, the above- referenced June 17, 1994, Public Notice contained the following questions and answers, which were consistent with other Commission and contractor answers on this subject: Question 5-2: If [the] FCC has approved only one IVDS equipment manufacturer to date, is the FCC willing to extend its build-out requirements schedule until a sufficient number of equipment suppliers exist? Doing so would allow license holders to gain the price advantages and innovations that competition among IVDS suppliers would create. Answer: At this time, it cannot be determined how many suppliers of IVDS equipment will be available, post-auction, to provide equipment to licensees. While it is true that currently only one company has received Commission "type acceptance" for its IVDS equipment, this may change once the auctions are concluded and potential suppliers assess the sales potential for such equipment. If it later appears that there is a problem because licensees cannot obtain equipment, the FCC will consider granting waivers on a case-by- case basis. Licensees are reminded, however, that the Commission addressed this issue in the Report and Order concerning IVDS in Gen Docket No. 91-2 (at paragraph 66). There, the Commission stated that it did not intend to relieve any IVDS licensee of the construction requirements on the

basis that development or deployment took longer than anticipated. Question 5-3: At this time, have any other manufacturers (other than Eon Corp.) applied for type-acceptance for IVDS? Answer: As of this date, no company other than EON Corporation has been granted type acceptance for equipment to operate in the IVDS. At least one other entity, however, has expressed an interest in providing IVDS equipment. For additional information in this area, you may want to review the comments filed in Gen. Docket No. 91-2, the proceeding that established the IVDS. [FN15] The state of the IVDS equipment market was a matter of public record prior to the auction, and all applicants had adequate time to analyze this information and adjust their bids accordingly. As noted in the October 7th Order, even if petitioners believed that sufficient equipment would not be available to meet the build-out deadline, the appropriate recourse would have been to request a waiver of that build-out deadline, not to withhold their down payment. [FN16] In light of Question and Answer 5-2, above, applicants were on notice that such build-out waivers would be considered by the Commission, if they later became necessary.

6. Petitioners have submitted no evidence that EON Corporation deliberately misled them prior to the auction. Further, we do not agree with petitioners' argument that EON Corporation had an affirmative obligation to join in a significant working or educational relationship with petitioners prior to the auction. Again, petitioners' concerns regarding equipment availability should have been reflected in their bid amounts. While some bidders might have proceeded very cautiously at auction, others might have assumed that the IVDS equipment market would change once the auctions were concluded and potential suppliers had assessed the sales potential for such equipment. This development in equipment manufacturing has, in fact, come to pass, with five manufacturers having received type acceptance for IVDS equipment, as of this date.

Waiver Standard

7. Louisiana and Vision state [FN17] that, prior to the auction, they held firm financial commitments to support their bidding, and that shortly after the auction these commitments were unexpectedly withdrawn. They argue that, on the specific facts they describe, they were serious, qualified bidders at the time of the auction, despite having subsequently missed the down payment deadline. In particular, they state that a facsimile letter they received between the time of the auction and the time of the initial down payment deadline (five days) motivated their investors to withdraw necessary financing. The letter, sent by one winning bidder to others, stated that, because IVDS equipment was purportedly unavailable, winning bidders should jointly petition the FCC to defer the August 8, 1994, deadline for initial down payments. [FN18] The letter, petitioners note, cast doubt on the ability of the IVDS industry in general to meet the one-year build-out deadline, and generated additional adverse publicity for the industry. Petitioners argue that this development was unforeseen, and their subsequent loss of financing was unavoidable. [FN19] In addition, they state that the October 7th Order, which addressed this issue, should have discussed the specific facts that they described in their waiver filings.

8. The Order stated, "If a single letter sent after the auction ... can derail financial commitments amounting to many thousands or even millions of dollars, we are concerned whether the bidder was ever a serious, qualified bidder." [FN20] We affirm this view. As noted above, the state of the IVDS equipment market was a matter of public record prior to the auction. In addition, winning bidders should have known that they would be required to pay their initial down payment only five days after the auction, and should have bid accordingly. As was also stated, "[t]he Commission ... cannot be responsible for the private business arrangements that an applicant has made to finance its successful bid." [FN21] The

Commission has taken precautions, including those of requiring financial certifications and down payments, to discourage defaults in the auction process; the Commission, however, generally should not delve into the sufficiency or strength of the underlying, private contractual arrangements of bidders, nor the efforts of bidders to overcome unexpected contractual difficulties. Here, as in other auction contexts, [FN22] petitioners could have taken reasonable precautions, such as securing back-up financing, to ensure timely payment in the event of unanticipated difficulties.

9. The Commission may enforce a strict standard in this context, if it is in the public interest to do so. [FN23] The petitioners' unanticipated lack of financing is not a special circumstance warranting a deviation from the general rule requiring a full and timely down payment, nor do we think that granting the requested waivers would serve the public interest. [FN24] As noted above, the down payment deadline is essential to ensure the integrity of our auctions process by preventing insincere bidding. We find that petitioners assumed the risk that unexpected financial circumstances, of the type described, might later occur. In addition, we find that the October 7th Order described sufficient supporting facts to reach its conclusions.

10. Petitioners make two additional, associated arguments: that the October 7th Order should have discussed petitioners' willingness to pay monetary penalties in the event the Commission granted the waiver requests, and that granting the requests would not prejudice winning bidders that paid on time, because licensing on behalf of such bidders could still proceed on schedule. In the Order, the Bureau noted that it was irrelevant that certain petitioners were "now assertedly willing and able to make their initial deposits if only the FCC [would] absolve them from any possible penalties for late payment." [FN25] We find that any current offer to make penalty payments does not alter our finding that petitioners have demonstrated no special circumstance justifying a waiver of the

down payment rule. In addition, we find that winning bidders that paid on time might be prejudiced by waiver grants that delay the licensing of others, because financial and equipment markets take notice of such agency actions and may alter their own actions as a result, adversely affecting prospective and existing licensees. Expectations that the rules perhaps need not be followed can, as the Bureau noted, "further encourage ... undesirable conduct and lessen the likelihood that in the future only serious, qualified bidders will participate in Commission-sponsored auctions." In any event, whether other winning bidders can be timely licensed despite the granting of waivers does not alter our determination that petitioners have stated no special circumstance warranting a deviation from the general payment rule.

Rules Prohibiting Collusion

11. Mayfield argues that the IVDS auction rules unduly restricted his ability to solicit financing after the filing of his FCC Form 175 ("short form") application. [FN26] At the time of the July 28-29, 1994, auction, Section 1.2105(c) of the Commission's Rules, 47 C.F.R. s 1.2105(c), stated: Prohibition of Collusion. After the filing of short-form applications, all bidders are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders until after the high bidder makes the required down payment, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application. [FN27] Section 1.2105(c) is intended to deter anticompetitive behavior during the auction. [FN28] While, as Mayfield notes, [FN29] this section was amended following the IVDS auction, [FN30] Mayfield and all other prospective bidders were subject to the Commission's rules as they existed at the time of the auction. Potential applicants such as Mayfield had ample opportunity to factor such anti-collusion rules into their

financing arrangements and bidding strategies prior to the auction. Moreover, our anti-collusion rules in effect during the IVDS auction permitted bidders to continue to seek financing from other entities who were not applicants in the auction. We decline to give retroactive effect to the amended rule, and deny Mayfield's request.

Speed of Service to the Public

12. Louisiana, Mayfield, and Vision argue that IVDS service will reach the public faster if we grant the requested waivers, rather than re-auction the subject licenses. [FN31] This asserted result is speculative and, even if true, is outweighed by the public interest in maintaining the integrity of the auction process and its payment rules. Provisions for Designated Entities

13. Mayfield argues that his waiver request is bolstered by his status as a minority-owned small business. [FN32] As required by Congress, we have adopted provisions to ensure that designated entities are afforded an opportunity to participate in IVDS auctions and in the provision of IVDS services. [FN33] We do not believe, however, that Mayfield's status as a designated entity warrants a waiver of the down payment requirements. Modification to Short Form Application

14. Mayfield seeks reconsideration of the denial of his request to amend his FCC Form 175 ("short form") application from individual applicant to partnership status." [FN34] Mayfield submits no argument to support this request, however, and we see no reason to alter the previous decision. The requested amendment would constitute a major modification to the application, and such modifications are not permitted pursuant to auction rules. [FN35] We therefore deny the request. Delegated Authority

15. Interactive and Vision argue that the October 7th Order is invalid because the Deputy Chief of the Common Carrier Bureau lacked authority to adopt the Order. [FN36] We

disagree. While the IVDS is a wireless telecommunications service (at that time, a service within the former Private Radio Bureau), the Deputy Chief had, at that time, been authorized to determine auction matters. In addition, by October 7th the Deputy Chief had formally been re-assigned to the Private Radio Bureau. [FN37] The Order, therefore, incorrectly reflected his job title, yet was adopted pursuant to an effective grant of delegated authority. Pursuant to the present de novo review, we affirm the Deputy Chief's determinations.

Conflict of Interest

16. Interactive argues that the Commission, as the entity both ruling on the subject waiver requests and administering the spectrum auctions, "has an inherent conflict with respect to any request that would impede its immediate production of revenue from auctions." [FN38] We reject this argument. Pursuant to Congressional directive, we have attempted to recover a portion of the value of the public spectrum made available through auctions, yet this goal has been balanced by other goals such as the rapid deployment of service and the efficient use of the spectrum. [FN39] Further, we are content that judicial oversight is a sufficient deterrent to any improper Commission decisions in this context.

III. ORDERING CLAUSE

17. Accordingly, IT IS ORDERED that the Application for Review filed by Commercial Realty St. Pete, Inc., IS DENIED. IT IS FURTHER ORDERED that the Petitions for Reconsideration filed by Interactive America Corporation, Louisiana Interactive Broadcasting System, Inc., Henry L. Mayfield, and Vision TV, Inc., ARE DENIED. IT IS FURTHER ORDERED that this action IS EFFECTIVE UPON RELEASE.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

FN1 47 C.F.R. s 95.816(c)(4); see also 47 C.F.R. s 1.2107.
FN2 Order, DA 94-1126, 9 FCCRcd 6384 (Common Carrier Bureau 1994) (Order).
FN3 Commercial Realty, Application for Review, filed October 19, 1994, EON Corporation (EON) filed an Opposition on October 28, 1994, to which Commercial Realty filed a Reply on November 10, 1994.
FN4 Interactive, Petition for Reconsideration, filed November 7, 1994; Louisiana, filed October 13, 1994; Mayfield, filed November 7, 1994; Vision, filed November 7, 1994.
FN5 See authorities in note 1, supra.
FN6 Second Report and Order in PP Docket No. 93-253, 9 FCCRcd 2348, 2381 P 190 (1994) (Second Report and Order), reconsideration granted in part, Second Memorandum Opinion and Order, 9 FCCRcd 7245 (1994).
FN7 Second Report and Order at 2381-82 P 192.
FN8 Id.
FN9 47 C.F.R. s 95.833(a). Section 95.833(a) specifies that each IVDS system licensee must make service available to at least 10 percent of the population or geographic area within the license service area within one year of the grant of the license; such "build-out" must then reach at least 30 percent within three years, and 50 percent within five years. The Commission is considering eliminating the one year/10 percent build-out requirement. Notice of Proposed Rule Making in WT Docket No. 95-131, FCC 95-318, released August 14, 1995.
FN10 Commercial Realty at 3-4; Interactive at 10-15.
FN11 Order at 6385 P 7.
FN12 Id. at P P 8-10.
FN13 Fourth Report and Order in PP Docket No. 93-253, 9 FCCRcd 2330 (1994) (Fourth Report and Order).

FN14 Public Notice, Mimeo No. 43797, released July 5, 1994; Public Notice, Mimeo No. 43554, released June 17, 1994; Public Notice, Mimeo No. 43550, released June 17, 1994; Public Notice, Report No. ABC-94-02, Auction No. 2, released May 23, 1994, 59 Fed.Reg. 28100 (May 31, 1994); see also News Release, Mimeo No. 43222, released May 25, 1994.

FN15 Public Notice, Mimeo No. 43550, released June 17, 1994, at 5-2 and 5-3.

FN16 See Order at 6385 n. 11. This was so, even if an applicant, see Interactive at 16-21, disagreed with the appropriateness of the build-out requirement.

FN17 Louisiana at 3, 5-7, 10-12; Vision at 3-5.

FN18 See Order at 6385 P 6.

FN19 Interactive also states that, given the "business realities" then confronting IVDS winning bidders, it was prudent not to pay: "The IVDS winning bidders had a responsibility to act in the best interests of their investors and financiers." Interactive at 22.

FN20 Order at 6385-86 P 11.

FN21 Id. at 6385 P 11; see also id. at 6386 P 13.

FN22 See, e.g., Order, In re Emergency Petition for Waiver of Deadline for Submission of Upfront Payments for Broadband PCS Auction filed by Personal Communications Corporation, DA 95-37, 10 FCCRcd 2124 (Wireless Telecom, Bureau 1995).

FN23 Cf. Green Country Mobilephone, Inc. v. FCC, 765 F.2d 235, 237, 239 (D.C.Cir.1985) (concerning FCC applications filing deadline).

FN24 See WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C.Cir.1969), cert. denied, 409 U.S. 1027 (1972); Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C.Cir.1990).

FN25 Order at 6386 n. 12.

FN26 Mayfield at 3-6.

FN27 This prohibition, which applied to all auctions, was recognized in the IVDS Fourth Report and Order at pages 2335-36, P P 32-33.

FN28 Second Report and Order at 2387-88 P P 222-225.
FN29 Mayfield at 3-6.
FN30 The amendments lessened the prohibitions in the section. Now, for example, applicants may amend their Form 175 application to make ownership changes or changes in the parties to bidding consortia, provided that such changes do not involve parties that might have bid against each other, and do not result in a change in control of the applicant.
FN31 Louisiana at 15-17; Mayfield at 7; Vision at 6.
FN32 Mayfield at 2-4, 7.)
FN33 See 47 C.F.R. s 95.816(d); Fourth Report and Order at 2336-40.
FN34 Mayfield at 1; see Order at 6385 n. 9.
FN35 47 C.F.R. ss 1.2105(b), 95.816(c).
FN36 Interactive at 9 n. 16; Vision at 1-2.
FN37 The re-assignment, from Deputy Chief of the Common Carrier Bureau to Deputy Chief of the Private Radio Bureau, was effective on August 21, 1994.
FN38 Interactive at 8-9.
FN39 Second Report and Order at 2361 P P 73-75.
10 F.C.C.R. 12153, 1995 WL 781084 (F.C.C.)

APPENDIX C, MEMORANDUM OPINION AND ORDER, FCC-96-271, WAIVERS IN THE FIRST AUCTION OF INTERACTIVE VIDEO AND DATA SERVICES (IVDS) LICENSES, rel. July 11, 1996.

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. By this action, we deny four petitions for reconsideration of our previous Memorandum Opinion and Order (MO&O) [FN1] in the above-captioned matter and dismiss a fifth petition for reconsideration as repetitious. The petitioners are winning bidders in an Interactive Video and Data Service (IVDS) auction [FN2] who failed to make a timely "down payment" on the licenses they won, and they filed requests for waiver of the payment deadline. A waiver of the subject down payment rule is appropriate "only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest." [FN3]

II. BACKGROUND

2. On July 28 and 29, 1994, the Commission held an auction to award IVDS licenses. [FN4] Pursuant to the auction rules, on August 8, 1994, winning bidders were required either to submit their total "down payment" amount or, if they claimed "small business" status, to pay an initial down payment equal to one-half of the total down payment amount. [FN5] Some winning bidders failed to make their down payment(s) by the August 8, 1994, deadline, and filed waiver requests seeking extensions of that payment deadline. [FN6] On October 7,

1994, these waiver requests were denied by Order pursuant to delegated authority. [FN7] On August 18, 1995, we denied the Application for Review of that Order filed by Commercial Realty St. Pete, Inc. (Commercial Realty), as well as Petitions for Reconsideration filed by Interactive America Corporation (Interactive), Louisiana Interactive Broadcasting System, Inc. (Louisiana), Henry Mayfield (Mayfield), and Vision TV, Inc. (Vision). [FN8]

3. We noted in the MO&O that all license grants are conditioned on full and timely payment of the license price. [FN9] Winning bidders are required to make a down payment on their licenses within five business days after being notified that they are the winning bidder on a license. [FN10] The requirement of a full and timely down payment is intended to ensure that winning bidders "have the financial capability to attract capital to rapidly deploy their systems and operate them in an efficient manner." [FN11] The down payment requirement ultimately helps deter defaults by discouraging "insincere" bidders (speculators) from winning licenses with the expectation that, post-auction, they can "shop" their winning bid in a late effort to obtain financing. [FN12] Permitting such actions, we have stated, "would undermine the integrity of the auction itself." [FN13] We also found in the MO&O that "petitioners assumed the risk that unexpected financial circumstances, of the type described, might later occur." [FN14] All five of the previous parties now request reconsideration of the MO&O. [FN15] No oppositions were filed.

III. DISCUSSION

A. Procedural Issues

4. As indicated supra, Commercial Realty previously filed an Application for Review of the Order. Under Section 1.106(b)(2) of the Commission's Rules, its Petition for Reconsideration must present new facts or changed circumstances. [FN16] The only additional information contained in its petition, however, is: (a) a transcription of the pre-auction videotape created by EON Corporation (the videotape was described in Commercial Realty's previous filings); (b) a transcription of a pre-auction Commission presentation on IVDS; and (c) a July 2, 1995 (post-auction), newspaper article describing, inter alia, the state of the IVDS equipment market. These items do not constitute new facts or changed circumstances. Therefore, Commercial Realty's petition for reconsideration is dismissed as repetitious. [FN17] Because Interactive, Louisiana, Mayfield, and Vision previously filed Petitions for Reconsideration, not Applications for Review, the merits of their petitions are discussed in detail below. [FN18]

B. Waiver Standard

5. As a threshold matter, it is worthwhile to consider the nature of a spectrum auction and the obligations it imposes on applicants/bidders. Certainly, one's voluntary participation in an auction carries an element of risk -- a risk that one's bid might be higher than the license is ultimately found to be worth, or a risk that post-auction events will otherwise be unfavorable to the licensee's business. Applicants, however,

agree to shoulder these risks and factor the likelihood of the risks occurring into the decision to participate in an auction and to bid a certain amount of money. The Commission's role in the auction process is limited, and the Commission cannot guarantee a bidder's success post-auction, nor should it attempt to do so. Rather, the Commission endeavors, within the limits of its resources, to educate all potential applicants of the nature of the service being auctioned, the particulars of the auction process, and the obligations attendant to investing in a license. Most necessary investigation and calculation relating to operation of the service in the marketplace, however, is left to the applicant. The essence of some arguments in this proceeding is a claim that the Commission or another entity misled the applicant to such an extent as to render the applicant's investigations and calculations useless. As explained below, the record evidence does not support this claim. Moreover, we remind potential auction participants that any auction for a new service carries express obligations despite the inherent uncertainties about the development of the service. Applicants should factor this unique mix of obligation and uncertainty into their bidding choices.

6. As noted, a waiver of the subject down payment rule is appropriate "only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest." [FN19] In an attempt to meet this waiver standard, petitioners make two arguments based on the actual or perceived state of the IVDS equipment market: (1) that, prior to the IVDS auction, they were misled about the current and potential availability of IVDS equipment; and (2) that, immediately after the auction, they lost financing or withheld

payment either because of a letter sent by one winning bidder to others, or because of the bad publicity created by the letter. [FN20] For the reasons described below, we conclude that petitioners have failed to demonstrate special circumstances justifying a waiver. Moreover, petitioners' reliance on other waiver cases to support their requests, as described below, is misplaced. In sum, we find that grant of the requested waivers would not serve the public interest.

(1) Lack of Special Circumstances: Pre-Auction Events

7. Interactive argues that, prior to the auction, it was misled by the Commission and an equipment manufacturer, EON Corporation (EON), [FN21] about the current and future availability of IVDS equipment, and that this misrepresentation justified its later non-payment of the required down payment. Specifically, Interactive argues, first, that the Commission over- emphasized the potential value of IVDS by stating in a pre-auction FCC Fact Sheet that "[s]ubscribers will be able to choose the camera angle during a sporting event, pay bills, shop-until-they-drop at malls, [etc.]." [FN22] We reject this argument. This recitation of possible future uses for the spectrum cannot reasonably be seen to have blunted the Commission's other cautionary statements concerning equipment availability. [FN23] Interactive further argues that an EON pre-auction, two-page promotional brochure created the "unmistakable" impression that EON equipment would be immediately available. Interactive cites, in particular, the EON statement, "Using leading-edge systems integration technology and world-class manufacturing processes, [Hewlett-Packard]

builds each [EON] Personal TV Unit to live up to their reputation for exceptional quality, reliability and high performance." [FN24] Interactive states that EON knew at that time that the Hewlett-Packard equipment, as pictured, would not be immediately available. We disagree with Interactive's characterization of this brochure and, based on our review, find that it is silent on the availability and price of equipment. Moreover, it instructs the reader to contact the company for additional information. In addition, we note that it is beyond the purview of the Commission to evaluate the factors that a company elects to consider in developing its auction strategy and equipment acquisition plans. We consider such matters to be independent business decisions within the applicant's control.

8. In the MO&O we stated, "[w]e do not agree with petitioners' argument that EON Corporation had an affirmative obligation to join in a significant working or educational relationship with petitioners prior to the auction." [FN25] We affirm this view. Although Interactive contends that, pre-auction, "there were very substantial flaws and omissions in th[e] public record" concerning equipment availability, we believe that the onus was on Interactive to evaluate the state of the market and the service's potential and determine whether to participate in the IVDS auction. Similarly, we disagree with Interactive's assertion that the Commission "rushed to auction" [FN26] under these circumstances. As noted in the MO&O, the Commission, through seminars, bidder information packages and fact sheets, took affirmative steps to provide all bidders with access to information useful in making business decisions about the value of the licenses, prior to auction.

[FN27] The Commission cannot, however, provide perfect information, nor can it guarantee the sufficiency or accuracy of information in areas outside of its purview. In the instance of the IVDS auction, the Commission was clear in informing potential auction participants of the build-out requirements and the current state of the "type- accepted" equipment market, which were the pertinent key elements within the Commission's area of expertise. [FN28] At the time of the auction, bidders could plan on building their own equipment within the technical constraints of the rules, or on purchasing off-the-shelf equipment from others. As a result, we conclude that the pre-auction events detailed by Interactive do not constitute special circumstances warranting a deviation from the down payment rule.

(2) Lack of Special Circumstances: Post-Auction Events

9. The time period between the end of the IVDS auction -- held July 28-29, 1994 -- and the deadline for submitting the initial down payment -- August 8, 1994 -- was ten calendar days. It was within ten days of making winning bids, then, that petitioners either chose not to pay, or found themselves unable to pay. During this time, Commercial Realty apparently sent a facsimile letter to certain winning bidders, stating that, because IVDS equipment was purportedly unavailable, winning bidders should jointly petition the FCC to defer the August 8, 1994, deadline for initial down payments. [FN29] As described in the MO&O, Interactive, Louisiana, and Vision note that the letter cast doubt on the ability of the IVDS industry in general to meet the one-year build-out

deadline, and generated adverse publicity for the industry. [FN30] More specifically, Interactive states that it chose to withhold its payment on the basis of adverse post-auction information it received from multiple sources, including potential equipment suppliers other than EON. [FN31] Louisiana states that it received two of the letters apparently sent by Commercial Realty, and that its lender financing was withdrawn as a result. [FN32] Finally, Vision states that part of its shareholder and investor financing was withdrawn post-auction because of adverse "national" press publicity. [FN33]

10. In the MO&O we stated, "[t]he petitioners' unanticipated lack of financing is not a special circumstance warranting a deviation from the general rule requiring a full and timely down payment, nor do we think that granting the requested waivers would serve the public interest.... We find that petitioners assumed the risk that unexpected financial circumstances, of the type described, might later occur." [FN34] We noted our reluctance to "delve into the sufficiency or strength of the underlying, private contractual arrangements of bidders, [or] the efforts of bidders to overcome unexpected contractual difficulties." [FN35] Finally, we stated, "[h]ere, as in other auction contexts, petitioners could have taken reasonable precautions, such as securing back-up financing, to ensure timely payment in the event of unanticipated difficulties." [FN36]

11. In response to the MO&O, Interactive states that the publicity that occurred immediately post-auction gave Interactive "new information [and] a swirl of rumors," and created a quandary: pay the amount owed and face the "drastic

consequences" of needing to meet the one-year construction "build-out" requirement, [FN37] or request a delay in making the payment. We believe, however, that, as stated in the MO&O, "even if petitioners believed that sufficient equipment would not be available to meet the build-out deadline, the appropriate recourse would have been to request a waiver of that build-out deadline, not to withhold their down payment." [FN38] Alternatively, Interactive could have met the payment deadline while requesting a waiver, rather than unilaterally deciding that payment was unwarranted given the asserted "new" information.

12. We also disagree with Louisiana's argument that Commercial Realty's actions were so "extreme" that "even the most reasonable and extensive financing arrangements by parties such as Petitioner could be and were disrupted." [FN39] We have initiated enforcement proceedings against Commercial Realty on the basis that, inter alia, Commercial Realty sent its facsimile letter to other winning bidders in an effort to disrupt the Commission's auction procedures. [FN40] Nonetheless, we believe that Louisiana's due diligence efforts should have included obtaining realistic valuations of the licenses in which it was interested, including the factoring in of equipment market and build-out considerations, and obtaining adequate, secure financing. We believe that Louisiana's subsequent problems could have been prevented by the use of back-up financing or other safeguards. Accordingly, we conclude that these post-auction events described by petitioners also fail to constitute special circumstances warranting a waiver of the down payment rule.

(3) Analogies to Other Waiver Cases

13. Interactive draws on three Wireless Telecommunications Bureau (Bureau) decisions as support for its waiver request. In the first two, the Bureau, in response to individual requests, waived the one-year build-out requirement for certain IVDS licenses awarded by lottery. [FN41] The Bureau waived the requirement (while retaining the three- and five-year requirements) because of ongoing agency appeals challenging the validity of the lottery and all resultant license grants. The Bureau stated, inter alia, that "it would be unreasonable to require the petitioners [licensees] to meet the current build- out requirements, given the uncertainty that exists concerning their licenses." [FN42] Interactive argues that "uncertainty" also existed, concerning equipment availability, at the time of the pertinent auction down payment deadline, and that both the lottery build-out requirement and the auction down payment requirement were designed to deter speculation in the awarding of licenses. [FN43] We disagree with Interactive's analysis. Uncertainty created by ongoing, post-lottery appeals going to the validity of license grants is not analogous to Interactive's asserted uncertainty over equipment availability, post-auction. Unlike the lottery cases, we have concluded here, as a factual matter, that petitioners, prior to auction, should have gauged the level of uncertainty with respect to equipment availability. We believe that if they had done so, the petitioners would have avoided what they consider an untenable post-auction situation.

14. Interactive's second analogy is to an Order in which the Bureau stayed the beginning of the "installment payment

program" [FN44] for IVDS licensees. [FN45] In that instance, numerous licensees that had fulfilled their down payment obligation requested, inter alia, various changes in the upcoming installment payment program: changes in the frequency of the required payments, and changes in the amount of the payments (in light of alleged "inflated" bids made at auction). To permit additional time for the Commission to respond to these substantive requests, the Bureau issued an Order staying the beginning of the installment payment program. [FN46] Interactive argues, "[b]ecause both decisions involved requests for waiver of a mandated payment deadline, there is no apparent principled distinction to be made between the sensible approach of delaying the installment payment deadline until the substance of petitioners' arguments for a delay can be evaluated, and the Commission's earlier refusal to extend the initial downpayment deadline in order to consider the impact of the significant post-auction revelations concerning the unavailability [of] IVDS equipment." [FN47] We disagree with this analysis, as well. First, the requests associated with the stay order were not waiver requests. In addition, given that the licensees affected by the Order had already made substantial down payments and thus demonstrated their bona fides as legitimate licensees, the Bureau's stay did not present the policy considerations we have described in reference to the down payment waiver requests. Finally, as we previously noted, we do not believe that the asserted post-auction information concerning equipment availability constituted new information that would have justified Interactive's deliberate non-payment.

C. "Hard Look" Argument

15. Petitioners argue that the Commission has failed to take a "hard look" at the arguments petitioners have proffered to support their waiver requests. [FN48] Specifically, petitioners state that the Commission has focused on the policies underlying the down payment rule -- attempting to ensure that winning bidders are financially capable, "sincere" bidders -- without assessing the particular reasons given for missing the down payment. We disagree, and affirm our analysis supra. [FN49] We determined in the MO&O that petitioners "assumed the risk that unexpected financial circumstances, of the type described, might later occur," and "could have taken reasonable precautions, such as securing back-up financing, to ensure timely payment in the event of unanticipated difficulties." [FN50] Contrary to petitioners' claims, our determinations do not mean that we have precluded the possibility of granting such waivers. Rather, they mean that the events described by petitioners, while unexpected in nature, do not rise to the level of a special circumstance warranting the grant of a waiver.

16. Interactive argues that the Commission was predisposed not to grant future IVDS build-out waivers. [FN51] In support, Interactive cites to two Public Notices. The first was released pre-auction in a "question and answer" format. Interactive points to the last two sentences of the Public Notice: Question 5-2: If [the] FCC has approved only one IVDS equipment manufacturer to date, is the FCC willing to extend its build-out requirements schedule until a sufficient number of equipment suppliers exist? Doing so would allow license

holders to gain the price advantages and innovations that competition among IVDS suppliers would create. Answer: At this time, it cannot be determined how many suppliers of IVDS equipment will be available, post-auction, to provide equipment to licensees. While it is true that currently only one company has received Commission "type acceptance" for its IVDS equipment, this may change once the auctions are concluded and potential suppliers assess the sales potential for such equipment. If it later appears that there is a problem because licensees cannot obtain equipment, the FCC will consider granting waivers on a case-by- case basis. Licensees are reminded, however, that the Commission addressed this issue in the Report and Order concerning IVDS in Gen Docket No. 91-2 (at paragraph 66). There, the Commission stated that it did not intend to relieve any IVDS licensee of the construction requirements on the basis that development or deployment took longer than anticipated. [FN52] We disagree with Interactive's interpretation of the Public Notice. The Public Notice stated that build-out waivers would be entertained, if and when necessary. In addition, the quoted language did not address the possibility that waivers might be granted in instances where an appropriate case was made outside of the arguments concerning deployment or development. Moreover, the one-year deadline, which was subsequently removed from the rules, [FN53] in fact gave winning bidders more than one year to meet the benchmark: the one- year period commenced at the time of licensing, not at the time of the auction. We therefore find that Interactive's asserted apprehension over the one-year deadline did not justify its withholding payment. We also disagree with Interactive's argument [FN54] that the Commission's

subsequent amendment of the build-out rules, to eliminate the one-year deadline while retaining the three-year and five-year deadlines, [FN55] supports its theory concerning apprehension. The build-out rule was amended "to provide licensees with greater flexibility in selecting service options, obtaining financing, selecting equipment, and other considerations related to construction of their systems," [FN56] not to accommodate delays in making the initial down payment. Interactive knew, or should have known, of the state of the equipment market and the existence of the build-out and payment rules, prior to making its winning bids. Also, as noted, bidders could plan to purchase equipment or, if necessary or advantageous, build their own equipment within the technical constraints of the rules. We therefore disagree with Interactive's arguments.

17. Interactive also cites language from a second Public Notice released just after the auction, and before the payment deadline. [FN57] The Public Notice states: A number of winning bidders have inquired about whether the Commission will change the due date for down payments. The Commission has not and does not intend to change its deadline. Bidders not submitting their full down payment by the required deadline will be considered to be in default and the licenses will be reauctioned.... We understand that some winning bidders have been encouraging other winning bidders to delay their down payments. Any such delay will constitute default. [FN58] While the quoted language emphasizes the due date for payments and expresses the Commission's intention not to extend the deadline, it does not address the question of whether a timely-filed waiver request meeting the applicable standard would be granted. The Commission does not waive its rules

absent special circumstances, and the statements in this Public Notice, which are fully consistent with that approach, do not support the argument that the denial of the subject waiver requests was predetermined.

18. Concerning Mayfield, we gave his arguments a "hard look" in the MO&O. He again argues: (1) that the IVDS auction rules unduly restricted his ability to solicit financing after the filing of his FCC Form 175 ("short form") application; (2) that IVDS service will reach the public faster if we grant him the requested waiver, rather than re-auction his license; and (3) that the Commission should have permitted him, pre-auction, to amend his FCC Form 175 application from individual applicant to partnership status. [FN59] We see no reason to alter our previous conclusions. [FN60] Mayfield also argues that the Commission, in promulgating the auction rules concerning the above arguments, failed to fulfill its statutory obligation to ensure that designated entities are afforded an opportunity to participate in IVDS auctions and in the provision of IVDS services. [FN61] Mayfield's challenge to various rules amounts to an untimely petition for reconsideration of those rules, and will not now be entertained. [FN62] Finally, Mayfield notes that the Commission, post-auction, amended the rules concerning collusion and amendments to the short form. As we noted in the MO&O, [FN63] however, all prospective bidders were subject to the same rules as those rules existed at the time of the auction. Moreover, bidders in any spectrum auction, proceeding under whatever version of rules exists at the time of the auction, should not bid beyond their actual financial capabilities when the time of bidding arrives. We deny Mayfield's petition.

D. Miscellaneous

19. Interest Payments on Amount Owed. Interactive emphasizes that it originally sought only a 30-day extension of the payment deadline, and was willing to pay interest on the amount owed. [FN64] As we have discussed, however, Interactive has failed to demonstrate special circumstances warranting a deviation from the general rule requiring payment, and Interactive's offer to ameliorate the effects of its non-payment does not affect this determination.

20. Conflict of Interest. Interactive argues that the Commission should follow a procedure whereby "autonomous" Commission staff, meaning staff independent of those with a role in conducting auctions, would determine initial waiver requests concerning auction payment matters. [FN65] Interactive states that the "prestige" resulting from auction revenues can create a conflict at the staff level. We do not perceive any conflict of interest requiring such a procedure. Often, staff familiar with a given area of substantive law are given responsibility for initially assessing filings, including waiver requests, in their area of expertise. We do not perceive the need to create separate procedures for such filings with respect to auctionable services.

21. Other Procedural Requests. Louisiana has filed a "Petition for Reconsideration, Leave to File Supplemental Evidence and Motion to Sever," and a concurrent Request for Stay of the MO&O. The Request for Stay is now moot, except that Louisiana also requests that this present decision not be made effective until forty days following its release. Because Louisiana gives no reasons to support its request, and we see

none, we deny the request. Concerning Louisiana's additional captioned requests, Louisiana requests, first, that it be permitted to file in this matter additional evidence, as it becomes available through the Commission's enforcement proceeding against Commercial Realty, of Commercial Realty's effect on Louisiana's financing. We deny this request. Louisiana is already best situated to know the facts in this context that are specific to its case, and additional information concerning other licensees or the industry in general will not buttress the record that Louisiana has already submitted on its behalf. Louisiana also requests that its petitions in this matter be severed from those of Commercial Realty, to avoid ex parte difficulties. This is unnecessary. While we have addressed each petitioner's arguments in this matter in one document, the request of each petitioner is a separate matter. Granting Louisiana's severance request would not change the application of the ex parte rules to its request. We therefore deny this request.

IV. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Commercial Realty St. Pete, Inc., IS DISMISSED.

23. IT IS FURTHER ORDERED that the Petitions for Reconsideration filed by Interactive America Corporation, Henry Mayfield, and Vision TV, Inc., ARE DENIED.

24. IT IS FURTHER ORDERED that the Request for Stay and "Petition for Reconsideration, Leave to File Supplemental Evidence and Motion to Sever," filed by Louisiana Interactive Broadcasting System, Inc., ARE

DENIED.

25. IT IS FURTHER ORDERED that this action IS EFFECTIVE UPON RELEASE.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

FN1. Memorandum Opinion and Order (MO&O), 10 FCC Rcd 12153 (1995).

FN2. This was the initial IVDS auction held July 28 and 29, 1994. See generally Public Notice, "Announcing High Bidders for 594 Interactive Video and Data Service (IVDS) Licenses," Mimeo 44160 (Aug. 2, 1994).

FN3. Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990); see WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972); 47 C.F.R. s 1.3.

FN4. See note 2, supra.

FN5. 47 C.F.R. s 95.816(c)(4); see also 47 C.F.R. s 1.2107.

FN6. See Order, 9 FCC Rcd 6384, 6384 (Common Carrier Bureau 1994) (Order).

FN7. Id. at 6385-86.

FN8. MO&O, 10 FCC Rcd at 12156.

FN9. Id. at 12153.

FN10. See note 5, supra.

FN11. Second Report and Order in PP Docket No. 93-253, 9 FCC Rcd 2348, 2381 P 190 (1994) (Second Report and Order), reconsideration granted in part, Second Memorandum Opinion

and Order, 9 FCC Rcd 7245 (1994).

FN12. Second Report and Order, 9 FCC Rcd at 2381-82.

FN13. Id. at 2382.

FN14. MO&O, 10 FCC Rcd at 12155.

FN15. The five Petitions for Reconsideration were filed on October 2, 1995, with the exception of Commercial Realty's, which was filed on September 25, 1995. Louisiana's filing, "Petition for Reconsideration, Leave to File Supplemental Evidence and Motion to Sever," contains additional requests that we discuss, along with a concurrent Louisiana Request for Stay, in paragraph 21, infra.

FN16. 47 C.F.R. s 1.106(b)(2).

FN17. See id. s 1.106(b)(3).

FN18. See id. s 1.106(b)(1).

FN19. Northeast Cellular Telephone Co. v. FCC, 897 F.2d at 1166.

FN20. See paragraphs 7-12, infra.

FN21. At the time in question, EON Corporation was known as TV Answer, Inc.

FN22. Interactive at 8, quoting FCC Fact Sheet, "Interactive Video and Data Service (IVDS)" (October 1993) (emphasis added by Interactive).

FN23. See MO&O, 10 FCC Rcd at 12153-54 (discussion of Commission actions).

FN24. Interactive at 6 (emphasis added by Interactive), quoting "Personal TV Unit" (Feb. 1993).

FN25. MO&O, 10 FCC Rcd at 12154.

FN26. Interactive at 10.

FN27. See note 23, supra.

FN28. Id.

FN29. See id. at 12154; Order, 9 FCC Rcd at 6385; Order to Show Cause in WT Docket No. 95-26, 10 FCC Rcd 4313, 4315 (1995).

FN30. MO&O, 10 FCC Rcd at 12154; see Order, 9 FCC Rcd at 6385.

FN31. Interactive at 11-12. In its previous filing in this matter, Interactive stated that, given the "business realities" then confronting IVDS winning bidders, it was prudent not to pay: "The IVDS winning bidders had a responsibility to act in the best interests of their investors and financiers." Interactive, first Petition for Reconsideration at 22 (filed November 7, 1994); see MO&O, 10 FCC Rcd at 12154 n.19.

FN32. Louisiana at 3; Louisiana, first Petition for Reconsideration at 5-6 (filed October 13, 1994).

FN33. Vision at 2 & n.3, 4, & Attachments 1 and 2 (declarations).

FN34. MO&O, 10 FCC Rcd at 12155.

FN35. Id.

FN36. Id. (internal citations omitted).

FN37. See former 47 C.F.R. s 95.833(a) (1995). The IVDS build-out rule, at the time of the auction, required that licensees must make service available to at least ten percent of the service area population or geographic service area within one year of the grant of the license, thirty percent within three years, and fifty percent within five years. The one-year requirement was later eliminated. Report and Order in WT Docket No. 95-131, FCC 95-506 (released Jan. 16, 1996).

FN38. See MO&O, 10 FCC Rcd at 12154.

FN39. Louisiana at 2-3.

FN40. See, e.g., Order to Show Cause, 10 FCC Rcd at 4319-20.

The proceeding involved issues of alleged false financial declarations and a false auction application certification. Id. at 4317-19.

FN41. Order, DA 95-617, 10 FCC Rcd 4014 (Wireless Telecom. Bureau 1995); Order, DA 95-481, 10 FCC Rcd 4546 (Wireless Telecom. Bureau 1995).

FN42. Order, DA 95-617, 10 FCC Rcd at 4014; Order, DA 95-481, 10 FCC Rcd at 4546.

FN43. Interactive at 19-20.

FN44. Following the fulfillment of down payment obligations, IVDS licensees that qualify as small businesses are eligible to pay their winning bid amount(s) in installments over the five-year term of the license(s). 47 C.F.R. s 95.816(d).

FN45. Order, DA 95-2029 (Wireless Telecom. Bureau Sept. 22, 1995). See also Vision at 5.

FN46. Id.

FN47. Interactive at 21.

FN48. Interactive at 18-19; Louisiana at 3; Mayfield at 2, 7, 12; Vision at 3- 5.

FN49. See paragraph 8, supra.

FN50. MO&O, 10 FCC Rcd at 12155.

FN51. Interactive at 12-13.

FN52. Id. at P 5, quoting Public Notice, Mimeo No. 43550, at 5-2 (released June 17, 1994).

FN53. See note 37, supra.

FN54. Interactive at 15-16.

FN55. See note 37, supra. At the time Interactive made its present argument, the Commission had only proposed the rule amendment.

FN56. Report and Order, FCC 95-506, at P 6.

FN57. Interactive at 19 n.37.

FN58. Public Notice, "IVDS Bidder Alert" (released Aug. 5, 1994). The Public Notice was sent to all winning bidders by overnight delivery.

FN59. Mayfield at 2-15.

FN60. See MO&O, 10 FCC Rcd at 12155-56.

FN61. Mayfield at 2-11, 14-15; see generally 47 U.S.C. ss 309(j)(3)(B), (4)(D); 47 C.F.R. s 95.816(d); Fourth Report and Order in PP Docket No. 93- 253, 9 FCC Rcd 2330, 2336-40 (1994).

FN62. Petitions for reconsideration must be filed no later than 30 days after public notice of a Commission action. See 47 U.S.C. s 405. Public notice of the Commission's adoption of the general rules in question, 47 C.F.R. s 95.816(1994), commenced on May 13, 1994. (Mayfield does not specify which rules he challenges, but the broadest reading of his argument covers these general rules.) Thus, Mayfield's challenges should have been filed by June 13, 1994.

FN63. MO&O, 10 FCC Rcd at 12155.

FN64. Interactive at 3, 16-18.

FN65. Id. at 21-22; see also MO&O, 10 FCC Rcd at 12156.

11 F.C.C.R. 8211, 11 FCC Rcd. 8211, 1996 WL 425104 (F.C.C.)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 96-1271 & 96-1320 **September Term, 1996**

Commercial Realty
St. Pete, Inc., et al.,
Petitioners

v.

Federal Communications Commission,
Respondent

Mandate Filed
August 20, 1997
E. Brown, Deputy Clerk

United States Court of
Appeals
Filed
May 22, 1997

On Petition for Review of an Order of the
Federal Communications Commission

Before: **SILBERMAN, GINSBURG, AND HENDERSON,** *Circuit Judges.*

JUDGMENT

These cases were considered on the record from the Federal Communications Commission (FCC) and on the briefs by counsel. The court has accorded the arguments full consideration and has determined the issues presented occasion no need for a published opinion. *See* D.C. Cir. Rule 36(b).

Commercial Realty St. Pete, Inc. and Interactive America Corp. petition for review of the FCC's denial of their request for a waiver of the first down payment deadline for Interactive Video and Data Service (IVDS) licenses they purchased at auction in July 1994. As they did before the FCC, the petitioners argue principally that IVDS technology was not sufficiently developed to allow them to meet the FCC's construction, or

"build-out," deadlines. But the FCC gave thorough, convincing explanations for denying their request for a waiver-including (a) bidders should have investigated the technology before the auction, (b) granting a waiver would be unfair to other winning bidders who made down payments, (c) enforcing the down payment requirement ensures that only *bona fide* bidders participate in auctions, and (d) the FCC provided notice prior to the auction regarding the availability of IVDS technology. *See* Deferred App. 2-3, 5-7, 11-20; *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (agency must "articulate a satisfactory explanation for its action"); *Adams Telecom, Inc. v. FCC*, 38 F.3d 576, 582 (D.C. Cir. 1994) (same). Moreover, the denial of their waiver request is consistent with the FCC's past practice. *See, e.g.*, BDPCS, Inc., FCC 96-498, 1997 WL 5982 (FCC Jan. 6, 1997) (denying waiver of down payment deadline on grounds, *inter alia*, that waiver would allow financially unsound bidders to participate in auctions and that bidders are responsible for their own business considerations); Personal Communications Corp., 10 F.C.C.R. 2124 (1995) (denying waiver of upfront payment deadline on grounds, *inter alia*, that waiver would harm parties that met deadline and would undermine bidding process).

As to Interactive America's due process argument, its allegations of bias are not borne out by the record and the FCC's "interest" in the auction was not "direct, personal, substantial, [and] pecuniary." *Tumey v. Ohio*, 273 U.S. 510, 523 (1927); *see also Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824 (1986); *Hortonville Joint School District No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 491-92 (1976); *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972). The other issues the petitioners raise do not merit discussion. It is, therefore,

ORDERED and **ADJUDGED** that the petition for review is hereby denied.

The clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41(a)(1).

FOR THE COURT:

Mark J. Langer, Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-1271 September Term, 1996

Commercial Realty St. Pete, Inc.,
Petitioner

v.

Filed
August 6, 1997
Clerk

Federal Communications Commission
and United States of America,
Respondents

Interactive America Corporation
Intervenor for Petitioner

Consolidated with 96-1320

BEFORE: Silberman, Ginsburg and Henderson, Circuit Judges

ORDER

Upon consideration of the petitions for rehearing of Commercial Realty St. Pete, Inc. and Interactive America Corporation, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY:
Robert A Bonner
Deputy Clerk